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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. BRUCE ALAN HICKMAN, Defendant and Appellant.	B218394 (Los Angeles County Super. Ct. No. VA090350)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark C. Kim, Leland H. Tipton, Judges. Affirmed with directions.

Law Offices of Christopher L. Hoglin and Christopher L. Hoglin for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Stephanie C. Brenan and Dawn S. Mortazavi, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant, Bruce Alan Hickman, pled nolo contendere to false statement, representation or concealment. (Unemp. Ins. Code, § 2101, subd. (a).) Defendant appeals from a subsequent probation revocation order. Defendant argues the trial court improperly imposed a state prison sentence and there was insufficient evidence to support the probation violation finding. The Attorney General argues that the abstract of judgment should be corrected to reflect the court security fee imposed. We affirm the judgment.

II. FACTUAL BACKGROUND

A. Original Conviction

Between April 25, 1999, and May 14, 2005, defendant worked and earned wages under three different social security numbers. During that same period, defendant collected unemployment benefits. Defendant received approximately $23,332 in benefits to which he was not entitled.

B. Probation Violation

On August 30, 2008, Derek Morgan was working as a plain-clothes security officer at the Target store on Bellflower Boulevard. Mr. Morgan was monitoring the live surveillance cameras in the office. Mr. Morgan saw defendant select several expensive digital blue-ray movies, including two boxed sets. Defendant had four children with him. Defendant placed the disks in the baby seat portion of the shopping cart. Mr. Morgan left the office and began to personally observe defendant from approximately 30 feet away. Defendant met with a female and they returned to the infants department of the store. Defendant selected what appeared to be a baby crib, placing it on top of the disks in the cart. Defendant walked to an unoccupied aisle where there were no surveillance camera domes in the ceiling. Mr. Morgan saw defendant remove a Target bag from his pocket. Defendant then took the movies and placed them in the bag. Defendant put the Target bag into the cart under the crib. Defendant went to the market area of the store

before proceeding to the checkout register. Defendant paid for the items in his shopping cart. However, defendant did not pay for the movies, which remained in the bag. Defendant walked toward the exit doors. However, defendant turned around abruptly when he was approximately 10 feet from the doors.

Mr. Morgan had telephoned the Long Beach Police Department of a possible theft in progress. A police officer had entered the door when defendant abruptly turned around. Two other officers were standing outside the doors. Defendant went to the food court area. Defendant sat down at a table. Defendant reached into his shopping cart. Defendant removed the bag containing the movies and placed it underneath the table. Defendant then got up and walked out the exit door. The movies, which were valued at approximately $499.90, were recovered. By reviewing computer records and video depicting defendant at the register, Mr. Morgan was able to determine that defendant had not paid for the movies when he paid for the other items in his cart.

Defendant testified on his own behalf that he and his wife, Margarita Hickman, and their children were in the Target store on August 30, 2008. Defendant was caring for his four children while his wife was in the restroom. Some of his children handed video movies to him and asked him to buy them. Defendant initially refused to buy them because the children were not behaving well. However, he changed his mind and selected one of the movies they requested. Defendant then met Mrs. Hickman in the children's section. While there, they selected two car seats, a safety gate and a few other items for purchase. Defendant denied placing the video movies into a Target bag. Defendant said that the video movies had fallen from the baby seat in the cart down into the cart itself. Defendant and Mrs. Hickman pulled their two carts through the checkout area with the larger items remaining in the carts. By that time Defendant's children were "acting up." Defendant had forgotten about the movies. As defendant approached the exit doors, Mrs. Hickman called out to him from the food court. Mrs. Hickman wanted to purchase food for the children. However, the only food available at the time was popcorn. While Mrs. Hickman was in line at the food court, defendant looked over his receipt. When he realized the blue-ray movie disks had not been paid for, he removed

them and placed them on top of the table. The movies were not in a bag. Defendant had intended to purchase the disks.

As he exited the Target store, a Long Beach police officer stopped his cart with her foot. The officer asked to see his receipt. Defendant handed her the receipt. Thereafter, the officer gave him the receipt and said, "Have a good day." Defendant placed his items and family in their car. Defendant drove to the drive-through window of the McDonald's restaurant in the Target parking lot to get food for his children. Defendant was stopped by the police for not wearing a seat belt. Defendant was arrested.

Mrs. Hickman testified that after she had gone to the restroom, defendant met her in the baby section, where he selected two car seats. Mrs. Hickman did not see defendant with a plastic Target bag. She did not see a Target bag in his shopping cart. After leaving the cash registers, Mrs. Hickman went to the food court to get snacks for her children. Mrs. Hickman had to call defendant back because he kept walking. When Mrs. Hickman determined there was nothing the children wanted to eat, she decided to go to McDonald's. Mrs. Hickman did not see defendant take anything from his shopping cart while in the food court.

III. DISCUSSION

A. Sentencing

1. Factual and procedural background

Defendant argues that the trial court improperly imposed a three-year prison sentence because his no contest plea was for a misdemeanor violation of Unemployment Insurance Code section 2101, subdivision (a). We disagree. On July 28, 2005, defendant was charged in a felony complaint for arrest warrant with violation of Unemployment Insurance Code section 2101, subdivision (a). The complaint specifically indicates the offense was a felony. On September 25, 2007, defendant appeared for arraignment. The complaint and arrest report were given to defendant's appointed counsel. Defendant pled not guilty. On February 8, 2008, defendant withdrew his not guilty plea, waived his constitutional rights, and pled nolo contendere to a violation of Unemployment Insurance Code section 2101, subdivision (a). At the probation and sentencing hearing on July 29,

2008, the trial court noted: "[Defendant] has met the first step which is having the $5,000 of the stipulated amount of restitution at $23,332, which means that we have five years formal probation, time served. [¶] And the other matter is the probation becomes a prettier probation if he pays his restitution in full by the three years." Thereafter, the trial court ordered: "As to count 1, violation of 2101(a) of the Unemployment Insurance Code, imposition sentence is suspended, you are placed on summary - - I'm sorry - - formal probation for five years on the following terms and conditions: [¶] . . . [¶] Spend two days in the county jail; credit two."

At the time defendant's probation was revoked, the trial court indicated the sentence for violating Unemployment Insurance Code section 2101, subdivision (a): "It is s a 16 [months], two [years], three [years]." Defense counsel argued: "Your honor, I believe that at the time that [defendant] entered that plea, his understanding was that the maximum penalty he was looking at is up to a year, which is clear according to the statute [Unemployment Insurance Code]." The trial court responded: "You can't plead to felony at maximum of one year. There is no such a felony." The trial court continued: "This is a wobbler, which means you could get up to one year, or if you go to prison, it is 16, two, three." In imposing the high three-year prison term, the trial court noted: "When [defendant] was initially sentenced, the probation report indicated that he should get the maximum confinement time allowable under probation, which would have been 365 days. He got two days when he was sentenced. [¶] He had a total of 12 arrests, of which - - resulting in seven misdemeanor convictions. [¶] He pled to this case August of 2008, involving loss of $23,000. He picks up a new case within a month after he was placed on probation for five years. [¶] Now, five years is basically - - is relatively a longer probationary period than normal because normal is three years. He basically took his prior conviction, in which he got five-year probation, and he didn't take it serious. He committed a new crime involving theft. He is not suitable for probation."

2. The trial court could properly impose the three-year prison term

Unemployment Insurance Code section 2101, subdivision (a), states: "It is a violation of this chapter to willfully make a false statement or representation, to

knowingly fail to disclose a material fact, or to use a false name, false social security number, or other false identification to obtain, increase, reduce or defeat any benefit or payment, whether for the maker or for any other person, under any of the following statutes: [¶] (1) The provisions of this division." Punishment for violation of Unemployment Insurance Code section 2101, subdivision (a) is set forth in section 2122: "[A] violation of this chapter is punishable by imprisonment in the county jail not to exceed one year, or in the state prison, or by a fine of not more than twenty thousand dollars ($20,000), or by both the fine and imprisonment, at the discretion of the court." (See also *People v. Williams* (2005) 35 Cal.4th 817, 830; *People v. Booker* (1994) 21 Cal.App.4th 1517, 1523-1524.)

Penal Code[1] section 17 states: "(a) A felony is a crime which is punishable with death or by imprisonment in the state prison. Every other crime or public offense is a misdemeanor except those offenses that are classified as infractions. [¶] (b) When a crime is punishable, in the discretion of the court, by imprisonment in the state prison or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances: [¶] . . . [¶] (3) When the court grants probation to a defendant without imposition of sentence and at the time of granting probation, or on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor."

In this case, the trial court did not impose sentence when defendant was granted probation. The trial court did not declare the offense to be a misdemeanor. Rather, as set forth above, imposition of sentence was suspended and defendant was placed on formal probation along with two days in the county jail as a condition of that probation. Defendant received credit for the two days he had already served. In *People v. Esparza* (1967) 253 Cal.App.2d 362, 364-365, our colleagues in the Court of Appeal for the Fifth Appellate District held: "It is settled that where the offense is alternatively a felony or misdemeanor (depending upon the sentence), and the court suspends the pronouncement

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1 All further statutory references are to the Penal Code unless otherwise indicated.

of judgment or imposition of sentence and grants probation, the offense is regarded a felony for all purposes until judgment or sentence and if no judgment is pronounced it remains a felony. (*People v. Banks* [(1959)] 53 Cal.2d 370; *People v. Williams* [(1945)] 27 Cal.2d 220; *People v. Lippner* [(1933)] 219 Cal. 395.)"

Defendant's attempt to draw an analogy to the case of *People v. Statum* (2002) 28 Cal.4th 682, is misplaced. In *Statum*, the defendant was charged with a "wobbler." However, following plea negotiations, the trial court, over the prosecutor's objections, specifically reduced the charge to a misdemeanor and sentenced defendant to 365 days in county jail. Here, defendant argues the trial court's decision to place him on formal probation and serve a two-day jail sentence amounted to a reduction of the charges to a misdemeanor. We disagree. The fact that defendant was ordered to serve two days in county jail was a condition of his probation and did not constitute a sentence within the meaning of section 17. (See *People v. Camillo* (1988) 198 Cal.App.3d 981, 986, fn. 2; *People v. Esparza, supra,* 253 Cal.App.2d at p. 365.) Because sentencing was suspended and defendant's offense remained a felony, the trial court had the discretion to impose a state prison sentence following probation revocation.

B. Sufficiency of the Evidence

Defendant argues there was insufficient evidence to support his probation revocation. The California Supreme Court has found proof of a probation violation by preponderance of the evidence is sufficient to revoke probation. (*In re Eddie M.* (2003) 31 Cal.4th 480, 505-506; *People v. Rodriguez* (1990) 51 Cal.3d 437, 446; *People v. Stanphill* (2009) 170 Cal.App.4th 61, 72; *Jones v. Superior Court* (2004) 115 Cal.App.4th 48, 60; *People v. Perez* (1994) 30 Cal.App.4th 900, 904.) We review the trial court's revocation decision for abuse of discretion. (*People v. Rodrigues* (1994) 8 Cal 4th 1060, 1124-1125 [trial court's exercise of discretion "'must not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice'"]; *People v. Rodriguez, supra,* 51 Cal.3d at p. 443; *People v. Jordan* (1986) 42 Cal.3d 308, 316.) A probation revocation hearing is not a trial and serves a different public interest.

(*Gagnon v. Scarpelli* (1973) 411 U.S. 778, 788-789; *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 347; *Jones v. Superior Court, supra,* 115 Cal.App.4th at p. 60; *People v. Perez, supra,* 30 Cal.App.4th at p. 907.) The *Lucido* court held: "The fundamental role and responsibility of the hearing judge in a revocation proceeding is not to determine whether the probationer is guilty or innocent of a crime, but whether a violation of the terms of probation has occurred, and if so, whether it would be appropriate to allow the probationer to continue to retain his conditional liberty. [Citation.]" (*Lucido v. Superior Court, supra,* 51 Cal.3d at p. 348; see also § 1203.2; *People v. Stanphill, supra,*170 Cal.App.4th at p. 72; *People v. Monette* (1994) 25 Cal.App.4th 1572, 1575.)

The offense of theft, which is the unlawful taking of another's property, includes larceny. (Pen. Code, § 484; *People v. Shannon* (1998) 66 Cal.App.4th 649, 653; *People v. Creath* (1995) 31 Cal.App.4th 312, 318.) The asportation element or carrying away of the property is satisfied when "'"the goods were severed from the possession or custody of the owner, and in the possession of the thief, though it be but for a moment."' [Citation.]" (*People v. Khoury* (1980) 108 Cal.App.3d Supp. 1, 4.) However, the property need not be removed from the store or premises where it was kept to constitute theft, the defendant need only move it slightly with the intent to deprive the owner of it permanently. (*People v. Shannon, supra,* 66 Cal.App.4th at p. 654.) Defendant argues, "At no point did [he] wrongfully asport any property of the store with the concurrent intent to permanently deprive the owner thereof without properly paying for those items." There was substantial evidence that defendant both harbored the required intent to steal the merchandise and moved it from where it was kept in order to do so. Defendant randomly selected several blue-ray movie disks and placed them in the child seat of the shopping cart. Thereafter, defendant covered the disks with a large box. Defendant then went to another aisle of the store where no surveillance camera domes were visible and no other customers were present. Defendant placed the disks in a Target bag that he removed from his pocket. When defendant checked out, he did not pay for the disks. Defendant was on his way to the exit door when he saw a police officer enter. Defendant then turned his shopping cart around. Defendant went to the food court where he was

seen removing the bag that contained the disks. Defendant dropped the bag on the floor under the table before exiting the store. The trial court specifically found that defendant went into the store to commit theft. This finding was reasonable based upon the evidence presented at the revocation hearing and was neither arbitrary nor capricious.

C. Court Security Fee

The Attorney General argues that the $20 court security fee imposed by the trial court pursuant to section 1465.8, subdivision (a)(1) at the time defendant was placed on probation should be reflected on the abstract of judgment . We agree. (See *People v. Crabtree* (2009) 169 Cal.App.4th 1293, 1327-1328 [§ 1465.8 fee "is mandated as to '"every conviction,"' even if the sentence on a conviction is stayed. [Citation.]"]; *People v. Walz* (2008) 160 Cal.App.4th 1364, 1372-1373; *People v. Crittle* (2007) 154 Cal.App.4th 368, 371 [same]; *People v. Schoeb* (2005) 132 Cal.App.4th 861, 865-866 [§ 1465.8 "unambiguously requires a fee to be imposed for each of defendant's conviction. Under this statute, a court security fee attaches to 'every conviction for a criminal offense'"].) Therefore the section 1465.8, subdivision (a)(1) fee should be included on the abstract of judgment to reflect the sentence imposed. The trial court is to actively and personally insure the clerk accurately prepares a correct amended abstract of judgment. (*People v. Acosta* (2002) 29 Cal.4th 105, 109, fn. 2; *People v. Chan* (2005) 128 Cal.App.4th 408, 425-426.)

IV. DISPOSITION

Upon issuance of the remittitur, the clerk of the superior court shall correct the abstract of judgment to reflect the Penal Code section 1465.8, subdivision (a)(1) court security fee. The judgment is affirmed in all other respects.

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FERNS, J.*

We concur:

MOSK, ACTING P.J.

KRIEGLER, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.